

October 10, 2017

Exhibit 3

85-2-102(6):

(a) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

(b) The term does not include a change in water use related to the method of irrigation.

85-2-402(2):

[T]he department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate. . .

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use . . .

Water Rights for the 1980's, Albert Stone

- ▶ "Yet the Montana Water Use Act, cases and amendments did not so much represent a change in direction as rather a continuing development of existing law, which was largely case law. Some of the new statutory law was merely codification of prior case law. The Montana Supreme Court, in applying current statutory and case law seeks to understand and follow the pre-existing law that led to more recent development. The student or practitioner must also understand prior developments in order to interpret and understand recent developments and current law."

Gassert v. Noyes, 18 Mont. 216, 44 P. 959 (1896)

- ▶ In 1869 the defendant used water for placer mining purposes in Oro Fino Gulch. After use, the diverted water returned to Oro Fino Gulch and flowed into Browns Gulch. Plaintiff began irrigating from Browns Gulch in 1875. In 1878 the defendant moved the place of use for his water in such a manner that it no longer returned to Oro Fino and Browns Gulches and the plaintiff was deprived water he had come to rely upon.
- ▶ The Court concluded that although the defendant had the prior right to use of water from Oro Fino Gulch, that right was defined by actual use as established "for a term of years in a particular mode . . ."
- ▶ Subsequent water users, such as the plaintiff, had the right to appropriate water in reliance upon the limitations of actual use inherent in the prior appropriator's right. While the prior appropriator had the right to change his use the Court explained: "that a prior appropriator of water cannot so change the use of the water as to deprive the subsequent appropriator of his rights. If the prior appropriator cannot encroach upon the rights of the subsequent appropriator by changing the use, we think, for the same reasons, he cannot do so by changing the place of the use."

Featherman v Hennessy, 43 Mont. 310, 115 P. 983 (1911)

- ▶ Defendant had the right to divert 1,500 miners inches from Flint Creek for operation of a mill. Priority for his right was 1883. Evidence establish actual use in June, September and October each year.
- ▶ In 1905 he "changed" a 90 inches of his right for to the purpose of irrigation. The trial court concluded that the irrigation use constituted a new use rather than a change in use and was subject to a 1905 priority date rather than 1883.
- ▶ On appeal the Montana Supreme Court concluded: "the court properly limited the use to the time and purposes for which appellant had made his appropriation and theretofore used it, subject to such changes only, as to the purpose and place of use, as could be effected without infringement of the rights acquired by others pending such use."
- ▶ "The use of 90 inches for agricultural purposes was found to have been initiated on April 1, 1905. This was a change of the original use and resulted in a consumption of the quantity so diverted to the new use, and therefore amounted pro tanto to a new appropriation. Such being the case, under the rule above stated, the court reached the proper conclusion, to wit, that the right to use this amount for this purpose must bear the date at which the change was made."

Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067(1940)

- ▶ The Court set out “three well-established” principles of water rights by appropriation:
 “First, that place of diversion, or place or purpose of use, may be changed only “if others are not thereby injured”; second, that subsequent appropriators of water take with notice of the conditions existing at the time they make their appropriations; third, that “as between appropriators the one first in time is first in right”; for by what constitutes an additional or third use or appropriation by the first user, an intervening appropriation by a second user, although earlier in time, might be entirely destroyed.”
- ▶ The Court recognized that the four corners of a typical decree do not provide the information necessary to determine whether subsequent water users will be adversely affected by a change in use:
 “Water rights are based upon beneficial use, and it is seldom, if ever, that an agricultural water right, adjudicated or otherwise, is used absolutely without any interruption throughout the irrigating season; therefore, the fact that no limitations in hours or days were expressly imposed on any of the water rights by the 1913 decree cannot logically be taken as an adjudication that the appropriations were of such absolutely uninterrupted flow. . . . the court's failure to include either of those two elements could not serve to expand the early water rights beyond the beneficial uses claimed and proved, or to remove the well-established limitation of the appropriator's right to waters actually taken and beneficially applied.”

Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067(1940)

- ▶ The Court concluded that fact that a decree does not specifically spell out the historic pattern of use for a water right does not mean those aspects of the water right are not properly considered in evaluating a change in use or complaint about expansion. The Court concluded that in order to determine whether the alleged “change in use” was consistent with the limits of the original water right :
 “it was proper for the trial court to consider the rights of the parties as the basis for its orders and instructions to the water commissioner; that in doing so under the usual form of decree awarding water rights in terms of flow measurement but failing to specify the exact acres irrigated or the time of flow or the volume of water actually used, it was not only proper but necessary to ascertain those other essential elements relative to the adjudicated water rights”

In the Matter of Royston, 249 Mont. 425, 816 P.2d 1054 (1991)

- ▶ The Court rejected the argument that shifting the burden of proving lack of adverse effect to the applicant violated the constitutional protections provided for existing water rights:

“A water right recognized by the 1972 Constitution does not include the right to not have to carry a burden of proof. This Court has held that the application of statutory procedures to water rights vested under the 1972 Montana Constitution is not unconstitutional.”

- ▶ The Court also concluded that DNRC did not abuse its discretion when it evaluated historic diversions, historic consumption, and historic return flows as part of its change analysis.
- ▶ At the same time, Court concluded that allowing other water users including objector's with existing water rights to rely upon the prima facie status of their claims for purposes of determining potential adverse effect did not violate Royston's right to due process.

Hohenlohe v. DNRC, 2010 MT 203, 357 Mont. 438, 240 P.3d 628

- ▶ The Department's use of volume in the processing of change applications does not constitute adjudication of the underlying water right.
- ▶ “The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the ‘amount historically consumed’ and the water that re-enters the stream as return flow.”
- ▶ “The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law-that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator ‘is entitled to have the water flow in the same manner as when he located,’ and the appropriator may insist that prior appropriators do not affect adversely his rights.”

Town of Manhattan v. DNRC, 2012 Mont. 81, 364 Mont. 450, 276 P.3d 920

- ▶ “Even though the Montana Constitution recognizes and protects existing rights, it does not exempt them from the requirement of DNRC approval of a proposed change. The Act requires that the applicant for approval of a change must prove by a preponderance of the evidence that the change will not adversely affect other water users”
- ▶ “The required details of historic use are set forth in Admin. R.M. 36.12.1902(7), and they relate to the DNRC’s obligation to ensure that a change will not adversely affect other water rights, § 85–2–402(2), MCA. Further, it is an established tenet of Montana water law that an appropriator’s right attaches to “waters actually taken and beneficially applied.” *Quigley v. McIntosh*, 110 Mont. 495, 509, 103 P.2d 1067, 1074 (1940); *Hohenlohe*, ¶ 43. Existing (pre-July 1, 1973) rights entitle the user to “such an amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use.” *McDonald v. State*, 220 Mont. 519, 529, 722 P.2d 598, 604 (1986).”
- ▶ “Based upon established Montana law and the applicable regulations, the DNRC was within its lawful authority to request that the Town provide information on its use of water prior to July 1, 1973 as part of its application for approval of its proposed changes.”